IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 13 OF 2000

WITH

CRIMINAL APPEAL NO. 357 OF 2001

CRIMINAL APPEAL NO. 13 OF 2000
IN
S.C. NO. 42 OF 1998

Satyanarayan Vithal Ambat .. Appellant.
(Orig.Accused No.2)
Versus
The State of Maharashtra. .. Respondent.

Mr. Vinod H. Waghole i/by H.S. Venegavkar
for appellant.
Mr. D.S. Mhaispurkar, APP for State.

WITH
CRIMINAL APPEAL NO. 357 OF 2001
IN
S.C. NO. 42 OF 1998

Phillips John Baptist. .. Appellant.
(Orig.Accused No.1)
Versus
The State of Maharashtra. .. Respondent.

Ms. Sharmila Kaushik for appellant.
Mr. D.S. Mhaispurkar, APP for State.

CORAM : J. N. PATEL AND

SMT. ROSHAN DALVI, JJ.

DATE : 19th June, 2006.

ORAL JUDGMENT : (PER J.N. PATEL, J.)

. In Sessions Case No. 42 of 1998 the appellants-accused in the two appeals were tried along with others on a charge that they have

committed murder of Firoz @ Bachchu Mohd. Salim Khalil Ahmed Khan and one Akhtar. The trial Court by judgement and order dated 29th October, 1999 found the appellant - original accused no. 1 Phillips John Baptist and appellant - original accused no. 2 Satyanarayan Vithal Ambat guilty of having committed offence punishable under Section 302 read with 120B and convicted and sentenced them to suffer rigorous imprisonment for life. They were also found guilty of the offence punishable under Section 201 of the IPC and came to be convicted and sentenced on the said count to suffer R.I. for one year and to pay fine of Rs. 2000/- in default to suffer further R.I. for six months. They were acquitted of the other charges with the further direction that their substantive sentences would run concurrently. The Court also granted them set off for the period they were in custody during the trial. In so far as the other co-accused are concerned, they were acquitted of all the charges. This is how the two appellants have preferred these two separate appeals which are heard and finally disposed of by this common judgment and order.

2. It is the prosecution’s case that R.C.F. Police Station received an anonymous phone call on 24.8.1997 at about 10.45 a.m. to the effect that in Chikhalwadi area near one Pimpal tree in a hut two persons were murdered. A station diary to this

effect came to be made by PSI Sawant who at the relevant time was attached to R.C.F. Police Station, PI Rao, API Kale, API Shinde and other police officers proceeded to Chikhalwadi to inquire into the matter. But they could not get any substantial information but they found that one hut was closed of which the owner was one Mangal Kamble (PW-8). On enquiry from Smt. Mangal Kamble they learnt that the hut was given on rent to Jyoti (PW-3) who was working as a barmaid and that she had left the said hut and removed her household articles. On this the police asked Mangal Kamble to send Jyoti to police station whenever she happens to meet him, and returned to the police station and made an entry in the station diary of closure of search as they could not get any substantial information. Thereafter on 27.8.1997 PSI Swamy who was the Duty Officer along with API Kale received wireless message from one WSI Anjelin (PW-1) that she found one dead body in the area of Chikhalwadi which was the limit of R.C.F. Police Station and that they should attend the matter by reaching the spot. So police officers from R.C.F. Police Station left for the site in accordance with the information. WSI Anjelin then showed them the place. Fire Brigade was called and they could take out the body from the water tank. However, since the smell still continued, again a requisition was made for the Fire Brigade and they could recover the

second dead body. It is the case of the prosecution that WSI Anjelin (PW-1) visited the water tank near the railway bridge in the area known as Priyadarshani Circle on receiving a wireless message at 4.55 p.m. on 27.8.1997 that a foul smell is spreading from the said water tank and on the basis of that information she had reached the spot. Therefore, R.C.F. Police Station registered Crime No. 205 of 1997 in R.C.F. Police Station, Sub-Division Trombay treating WSI Anjelin as the informer. The report was recorded as a F.I.R. and a case under Section 302, 201 read with Section 34 and 120B came to be registered against unknown persons. The police prepared an inquest panchanama of the dead bodies and the spot panchanama. Dead bodies were photographed and were sent to Rajawadi Hospital for conducting autopsy.

3. In the course of investigation the police got information about the suspect i.e. about Phillips John Baptist as the person who was visiting Jyoti. So they arrested him and his brother-in-law i.e. Satyanarayan appellant-original accused no. 2 who was found with him in Rahul Nagar. It is after the arrest of these two suspects the police were able to arrest the remaining accused persons on the basis of the information received by them.

4. In the course of investigation the police

recorded statements of witnesses. They could also discover weapons from all the accused persons under Section 27 of the Evidence Act which were used in committing the murder. On the arrest of the accused persons, police seized their clothes. All the material seized during the course of investigation came to be forwarded to the Forensic Science Laboratory and after the investigation was completed, charge-sheet came to be filed. The Learned Metropolitan Magistrate committed the case to the Court of Sessions, Greater Bombay, for trial.

5. All the appellants-accused were charged for having hatched a conspiracy to commit murder of the two victims and for having formed an unlawful assembly whose common object was to commit murder with deadly weapons i.e. choppers, knives and iron rods and to cause disappearance of evidence by disposing of their dead bodies by throwing them in water tank. They were also charged for having committed offence under Arms Act as well as under the Bombay Police Act. The accused persons pleaded not guilty and claimed to be tried. Their defence was of false implication.

6. In support of their case the prosecution examined Anwar Amin Sahab Bagi (PW-2) as an eye witness. On the point of motive and conspiracy, PW-3 Jyoti and wife of appellant-original accused

no. 2 Smt. Laxmi P. Baptist (PW-4) who are star witnesses of the prosecution, in addition to Smt. Mangal C. Kamble (PW-8), the landlady of the hut. In order to establish that the alleged offence was committed by the accused persons.

7. The prosecution also examined panchas who were witnesses to the arrest, seizure of clothes and discovery of weapons from the respective accused persons and relied upon the medical and forensic laboratory reports. The trial Court found that the prosecution has failed to establish case against all the accused persons except the appellants - original accused nos. 1 and 2 and that is how they came to be convicted.

8. It is submitted by the learned counsel for the appellants that the prosecution case is based on evidence of witnesses who were unreliable for the reason that their statements have been recorded only after accused persons came to be arrested and their evidence before the Court suffers from various infirmities as regards the manner in which the incident occurred and the complicity of the accused persons. It is submitted that in so far as PW-2 Anwar Bagi is concerned, he claims to have witnessed the incident but left the scene of occurrence before the incident actually occurred. Further, this witness has made a material improvement in his case

so as to implicate the appellant - original accused no. 2 Satayanarayan and, therefore, it would be unsafe to base a conviction on such evidence. The trial Court ignored this material omission and the fact that PW-2 Anwar Bagi is not an eye witness.

9. It is submitted that he is the sole witness examined by the prosecution about the incident.

10. It is further submitted that in so far as PW-3 Jyoti is concerned, her evidence also suffers from material omission and is unsafe to rely upon for the reason that she was not at the scene of occurrence at the time of the incident. She has also deposed about the aspect of conspiracy and as her evidence has not been relied upon by the trial Court on this count, it deserves to be discarded. In so far as PW-4 Smt. Laxmi, wife of Baptist, is concerned, she has been declared hostile and it can be found out from the admission given by her in cross-examination that she was detained in police custody for eight days. In so far as Smt. Mangal Kamble (PW-8), the landlady is concerned, she has also not witnessed the incident and the common factor on the basis of which the evidence of these witnesses deserves to be discarded is that their statements came to be recorded after arrest of the accused persons and there is unexplained delay of 8 to 9 days.

11. It is submitted that all other independent witnesses examined in this case as panchas cannot be relied upon for the reason that they are all prototype witnesses and the trial Court has not relied upon them in so far as their evidence in respect of the co-accused are concerned from whom clothes and weapons of assault came to be seized. Therefore, this is a case of no evidence and prosecution having miserably failed to prove its case the appellants deserve to be acquitted.

12. The learned APP, on the other hand, submitted that Anwar Bagi (PW-2) is a witness who has deposed to the effect that the appellant accused along with other accused persons whom he could not identify, were last seen with the deceased persons, after he was assaulted by them and he ran away from the scene of offence i.e. the hut where Jyoti used to stay and, therefore, the only inference which can be drawn i.e. the appellants accused having committed the murder along with 5 others and as this witness has not been able to identify the other co-accused in the case, they have been given the benefit of doubt. In so far as the delay in recording the statement of the witnesses is concerned, it is submitted by the learned APP that the offence was detected late by the police and only after getting the necessary information they could

trace down the witnesses. It is further submitted that all these witnesses were otherwise friends of the accused and, therefore, on their own it was not expected of them to have gone to the police station and deposed against them and, therefore, merely because the other co-accused have been acquitted by the trial Court does not mean that the appellants-accused also deserved to be acquitted particularly when there is sufficient evidence against them to show their complicity in the crime direct and circumstantial.

13. The learned APP fairly conceded that the only direct evidence which is the evidence of PW-2 Anwar Bagi but then according to the learned APP the prosecution has brought on record the evidence of wife of Phillips Baptist to establish the motive to commit the murder of Bachchu and Akhtar as he became suspicious of their having illicit relations with his mistress i.e. PW-3 Jyoti who has supported the prosecution on this aspect though the wife of the appellant-accused i.e. PW-4 has turned hostile. It is submitted that the incident occurred during night time on a rainy day and, therefore, it was difficult to establish the identity of unknown accused persons. PW.-2 Anwar Bagi has been able to identify both the appellants accused Phillips Baptist and Satyanarayan and, therefore, their conviction by the trial Court is justified for having committed murder

of these two victims i.e. Bachchu and Akhtar and, therefore their appeals deserve to be dismissed.

14. With the able assistance of the learned counsel for the appellants and the learned APP we have gone through the evidence on record and the judgment of the trial Court.

15. We find that the trial Court has given undue importance to the evidence of PW-3 Jyoti and the whole finding of the trial Court hovers around evidence of Jyoti (PW-3) who was mistress of Phillips i.e. original accused no. 1 and it is in this background that the trial Court proceeded to accept the prosecution's case i.e. appellant-original accused no. 1 Phillips and appellant-accused no. 2 Satyanarayan, his brother-in-law i.e. brother of his wife PW-4 Smt. Laxmi have hatched the conspiracy and committed murder of Bachchu and Akhtar and thrown away their dead bodies in the water tank.

16. Let us examine evidence of Jyoti (PW-3) so as to find out how far she is a reliable witness. Jyoti (PW-3) has deposed to the effect that she was residing in the hut of Smt. Mangal Kamble (PW-8) which she has taken on rent and along with her Bachchu and Akhtar were also residing. She has stated that she was mistress of appellant-original

accused no. 1 Phillips Baptist who was suspecting her of having illicit relationship with Bachchu. According to her, on 21.8.1997 her husband Phillips came to her house and wanted her to accompany him to a picture from 6 p.m. to 9 p.m. They went for a movie but Phillips was not in proper mood and expressed to her that he would finish Bacchu as he was having doubt in his mind about relationship between herself and Bacchu and on earlier occasion also he has expressed so that he was suspecting illicit relationship between Jyoti and Bachhu and she had clarified that there was nothing between herself and Bachhu for raising such suspicion. After watching the movie when they returned home Anwar i.e. PW-2, Akhtar and Bachhu were there. Phillips paid Rs. 100/- to Anwar to bring liquor. Anwar brought liquor and they consumed liquor together and, thereafter Phillips is supposed to have left for the house of his wife. During the night while she was sleeping on a cot and Akhtar, Anwar and Bachhu sleeping on the floor at about 1.30 a.m. Laxmi (PW-4) came to their house and inquired about the whereabouts of Phillips. So they went to the house of Laxmi to see Phillips but as he was not available they all returned to Jyoti’s hut. At that time they heard some noise in the neighbouring hut and when they went there in the torch light they saw Phillips sitting in that hut by covering himself with the saree so they brought him back to their hut

and laid him on the cot. According to her, he was trying to feign feeling of shivering at which time Anwar(PW-2) told her to call Laxmi. So she went along with Akhtar to call Laxmi who came and told them to mind their own business and left the hut. Jyoti has further deposed that she requested Phillips to come along with her to the doctor but he denied and told her to leave him at his house and, therefore he was left at his house where Laxmi was residing.

17. Jyoti has further deposed that when she had been to the house of Phillips she was dragged inside and Phillips assaulted her for having illicit relations with Bachchu and confined her in the house. In the morning she was treated for injuries suffered by her. According to her, on the next date i.e. 22.8.1997 she overheard Phillips and Satyanarayan conspiring to commit murder of Bachchu and Satyanarayan assured Phillips that they would collect weapons and get boys to assault Bacchu and Phillips told Satyanarayan that he has to finish Bacchu, Akhtar and Anwar. Thereafter next day morning also Satyanarayan had come. In the evening Satyanarayan brought those boys. At that time she was on the loft. She saw the boys who took meal at around 10 to 10.30 p.m. and thereafter Phillips and Satyanarayan left for going to her hut along with the boys. After having assured that she has gone to

sleep, it was at 1.00 to 1.30 a.m. that Satyanarayan and Phillips came back. At that time Phillips was having an iron bar in his hand. According to her, she was confined in the house of Laxmi for 2-3 days and was not allowed to go out. It was after 2-3 days that the landlady come to Laxmi's house and that is how she along with landlady went to the police station. It appears that the prosecutor was not satisfied with this evidence and sought permission of the Court to put leading questions to the witness without declaring her hostile in which she has identified iron bar Article 1 shown to her. In her cross-examination the whole story given by her about the conspiracy and that Satyanarayan brought the boys in the house of Laxmi and they had meal has been brought on record as an omission and when confronted with the same she offered an explanation that she does not recollect whether the police has taken her statement to that effect and how many times her statement come to be recorded.

18. If the evidence of PW-3 Jyoti is read along with the evidence of PW-2 Anwar Bagi, it is quite clear that none of them are telling the truth. In so far as PW-2 Anwar Amin Sahab Bagi is concerned, he stands corroborated by PW-3 Jyoti on the point that they all had liquor together at Jyoti's place after they had returned from seeing the movie but in

so far as the incident is concerned he deposed to the effect that on the following day i.e. after Joyti had taken Phillips to his house and did not return and they were residing in the hut of Jyoti with Bachhu, Akhtar and Anwar. While they were lying on the cot at about 10.00 p.m. somebody knocked the door and when Bachhu asked who was there, Phillips gave the call and therefore the door was opened by PW-2 Anwar Bagi. After Phillips entered the hut, he stood in front of Bachhu. He gave a whistle call and 4-5 persons entered the hut. One person who was slim and of fair complexion, assaulted him with the iron bar he brought with him. Some of them were having choppers. He caught hold the bar and fell down on the assailant who fell on his body. At that time Phillips gave a call that he was not the person and other two were there, (Bachhu and Akhtar) and they both be taken to task. Thereafter Anwar was left free and they started assaulting both these persons and that at this time he ran away from there. PW-2 Anwar has made specific mention of the fact that he saw one person Satyanarayan amongst the assailants. But has failed to identify the other co-accused. The non-mention of Satyanarayan as the person accompanying Phillips and the other assailants is the material omission which has been brought out in para 5 of his cross-examination. In order to satisfy ourselves we have examined the police statement of this witness

recorded under section 161 of the Criminal Procedure Code and found that this is an improvement made by the prosecution in their case through PW-2 Anwar in so far as presence of Satyanarayan is concerned. We find that it will be unsafe to rely upon such a witness whose conduct is most unnatural considering the fact that inspite of noticing that Phillips has come to the house of Jyoti where he was present along with two deceased, armed with deadly weapons started assaulting them, Anwar did not seek help by reporting the matter to the police. The police searched him out and recorded his statement after a delay of 8-9 days i.e. on 30.8.1997 i.e. after arrest of the culprits. In the re-cross-examination which was made after re-examination by the learned SPP in the trial Court about the identification of the dead body he has stated that he has identified the dead body after the statement was recorded whereas in re-examination in paragraph 7 he states that he was taken to the hospital for identification of the dead bodies. It is after the identification of the dead bodies his statement was not recorded by the police that the dead bodies were in decomposed condition. If this is to be believed, PSI A.K. Sawant (PW-15) states that on 29.8.1997 they traced Anwar from Dharavi and brought him to the police station. Anwar gave his statement which came to be recorded on 29th itself and from Anwar it was also got confirmed that another body was that of Akhtar.

He was sent for identifying the dead body of Akhtar. He identified the dead body and inspite the police giving information to the relatives of Akhtar, nobody turned up, whereas his police statement is of 30.8.1997. We find that to bring home the guilt against the appellant-accused he has tried to falsely implicate the appellant-accused Satyanarayan whose presence becomes doubtful due to the omission of this fact in his police statement and his failure to identify any of the other co-accused including his assailants makes his evidence suspect and, therefore, it would be most unsafe to rely upon such a witness considering his conduct of not reporting the matter to any person which was expected of him being friend of the two deceased persons and the delay in recording of his statement and failure to identify the other accused persons. We, therefore, find that the trial Court was not right in accepting the prosecution case on the basis of evidence of these witnesses particularly PW-2 Anwar and PW-3 Jyoti.

19. In so far as the corroboration part is concerned, the forensic evidence also does not lead us anywhere so as to come to the conclusion that the appellant-accused Phillips was involved in committing the murder.

20. As regards the complicity of other

co-accused is concerned, the trial Court has already disbelieved the prosecution case and for want of evidence they were rightly acquitted as the only material placed before the Court against the co-accused is in the form of their arrest, seizure of clothes and discovery of weapons.

21. Therefore, we find that the appellant-original accused no. 1 Phillips John Baptist deserves to be given benefit of doubt. In so far as appellant-original accused no. 2 Satyanarayan Vithal Ambat is concerned, we find no evidence against him to connect him with the crime. Therefore their appeals deserve to be allowed. The judgment and order dated 29th October, 1999 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 42 of 1998 finding the appellants guilty for offence punishable under section 302 read with section 120B of IPC is quashed and set aside and they stand acquitted of the charge. Their conviction and sentence under section 201 of IPC is also quashed and set aside and they are also acquitted of the said charge.

22. The appellant (Original Accused No. 1) Phillips John Baptist who is in jail be released forthwith if not required in any other case. The appellant (Original Accused No. 2) Satyanarayan Vithal Ambat is concerned, he is on bail. His bail

bonds stand cancelled.

(J.N. Patel, J.)

(Smt. Roshan Dalvi, J.)